88- 1746

Supreme Court, U.S.
FILED
APR 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF
THE UNITED STATES OF AMERICA

OCTOBER TERM - 1988

ON PETITION FOR WRIT OF
CERTIORARI TO THE SUPERIOR
COURT OF PENNSYLVANIA,
PITTSBURGH, PENNSYLVANIA

THOMAS E. MACURDY,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent

PETITION FOR WRIT OF CERTIORARI

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PUBLISHER'S NOTE:

Original Pagination is not continuous.

QUESTIONS PRESENTED

The questions presented, in this instance, for the court's consideration are:

1. Whether or not the Petitioner has been denied a speedy trial under the 6th Amendment of the U.S. Constitution and Rule 1100 of the Pennsylvania Rules of Criminal Procedure.

2. Whether or not Petitioner's petition for habeas corpus and setting aside extradition should have been allowed.

3. Have the courts of the Commonwealth of Pennsylvania deviated so dramatically from accepted and universal

application of legal principles in the instant situtation as to deprive appellant of the equal protection under the law pursuant of the 14th Amendment of the United States Constitution?

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OPINIONS BELOW

The February 6, 1989, Order of the Supreme Court of the Commonwealth of Pennsylvania at No. 427 W.D. Allocatur Docket 1988 (Appendix Page 87) is a denial of Petition for Allowance of Appeal from the decision of the Superior Court of the Commonwealth of Pennsylvania entered July 7, 1988 at Superior Court Nos. 193 Pittsburgh, 1984, 296 Pittsburgh, 1985, and 680 Pittsburgh, 1986. These are appeals from judgment and Sentence of the Court of Common Pleas of Allegheny County, Pennsylvania, dated April 9, 1986 at CC 7900473.

JURISDICTION

Jurisdiction of the Supreme Court of the United States is invoked under Rule 17 of the United States Supreme Court in that a state court of last resort has decided a federal question in a way in conflict with previous decisions of that court, with the decisions of another state court of last resort and of the Supreme Court of the United States and further a state court has decided an important question of federal law which has not previously been ruled upon by this court and has decided several federal questions in ways that are in conflict with applicable decisions of this court.

STATUTES INVOLVED

The following statutes of the federal government, amendments of the Constitution of the United States, and laws or rules of procedure of the Commonwealth of Pennsylvania are involved in this matter.

A. Amendment V of the United States Constitution

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be com-

pelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

B. Amendment VI of the United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have com-

pulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

C. Amendment XIV of the United States Constitution

1. All persons born or naturalized in the United States, and subject to the jurisdiction whereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection

of the laws...

D. Pennsylvania RCP 1100

(a)(1) Trial in a court case in which a written complaint is filed against the defendant after June 30, 1973 but before July 1, 1974 shall commence no later than two hundred seventy (270) days from the date on which the complaint is filed.

(2) Trial in a court case in which a written complaint is filed against the defendant after June 30, 1974 shall commence no later than one hundred eighty (180) days from the date on which the complaint is filed.

(c)(1) At any time prior to the expiration of the period for commencement of trial, the attorney

for the Commonwealth may apply to the court for an order extending the time for commencement of trial.

(2) A copy of such motion shall be served upon the defendant through his attorney, if any, and the defendant shall also have the right to be heard thereon.

(3) Such notice shall set forth facts in support thereof, and shall be granted only upon findings based upon a record showing that trial cannot be commenced within the prescribed period despite due diligence by the Commonwealth and, if the delay is due to the court's inability to try the defendant within the prescribed period, upon findings based upon a record showing the

causes of the delay and the reasons why the delay cannot be avoided.

(d) In determining the period for commencement of trial, there shall be excluded therefrom;

(1) the period of time between the filing of the written complaint and the defendant's arrest; provided that the defendant could not be apprehended because his whereabouts were unknown and could not be determined by due diligence;

(2) Any period of time for which the defendant expressly waives Rule 1100;

(3) Such period of delay at any stage of the proceedings as results from:

(i) The unavailability of the defendant or his attorney;

(ii) Any continuance granted at the request of the defendant or his attorney.

E. Pennsylvania Rule of Judicial Administration 1901

(a) General Policy. It is the policy of the unified judicial system to bring each pending matter to a final conclusion as promptly as possible consistently with the character of the matter and the resources of the system. Where a matter has been inactive for an unreasonable period of time, the tribunal, on its own motion, shall enter an appropriate order terminating the matter.

(b) Primary responsibility for implementation of policy

(1) Each court of common

pleas is primarily responsible for the implementation of the policy expressed in subdivsion (a) of this rule and is directed to make local rules of court for such purposes applicable to the court and to the community court or district justices of the peace of the judicial district.

(2) The Philadelphia Municipal Court and the Traffic Court of Philadelphia are directed to make rules of court for such purposes applicable to their respective courts.

(c) Minimum standards. Before any order terminating a matter on the ground of unreasonable activity is entered, the parties shall be given at least 30 days' written notice of

opportunity for hearing on such proposed termination, which notice shall be given:

(1) In person or by mail to the last address of record of the parties or their counsel of record and setting forth a brief identification of the matter be terminated; or

(2) By publication in the manner provided by rule of court in the legal newspaper designated by rule of court for the publication of legal notices in any case where notice by mail cannot be given or has been returned undelivered or where the docket of the matter shows no evidence of activity during the previous two years. Any matter terminated after notice by

publication pursuant to this paragraph may be reinstated by the court after dismissal upon written application for good cause shown.

(d) Effect of disposition of records. Notwithstanding any inconsistent provision of this rule or of any local rule of court made pursuant to this rule, court shall not entertain any application for reinstatement is filed after the documents relating to the matter have been disposed of pursuant to the applicable record retention schedule established by or pursuant to law.

F. Pa. R. Crim. P. 9023(a)

Except as otherwise provided in these rules, all written motions, and

any notice or document which service is required, shall be served upon each party concurrently with filing.

STATEMENT OF THE CASE

Petitioner was a Pennsylvania attorney who was charged with Theft by Failure to Make Required Disposition of Funds Received (18 Pa. C.S.A. Section 3927(a)) and Misapplication of Entrusted Property (18 Pa. C.S.A. Section 4113(a)), in connection with money received by him during the administration of an estate (the McDonough Estate). This complaint was filed on December 19, 1979. Petitioner was apprehended in Colorado on November 29, 1981. Extradition to Pennsylvania was ordered on August 10, 1983 and occurred on August 13, 1983. Petitioner was convicted and sentenced by the Court of Common Pleas of Allegheny County on April 9, 1986.

In addition to the McDonough Estate case, Petitioner was also charged with theft of funds in connection with another estate (the Moretti Estate) and with Default in Required Appearance (18 Pa. C.S.A. Section 5124) in connection with the Moretti charges. His extradition to Pennsylvania was based upon all three criminal informations. Only the McDonough Estate case has proceeded to trial; the remaining informations are pending in the Court of Common Pleas of Allegheny County.

On August 1, 1983, Allegheny County, Pennsylvania, Court of Common Pleas Judge Robert E. Dauer dismissed with prejudice the Moretti Estate case and the Default in Required Appearance case.

subsequent to this, on or about August 17, 1983, the Commonwealth discovered the irregularities of what it was involved in and proceeded with an ex parte petition to reinstate the complaints. This was accomplished on August 17, 1983, with an order being entered to reinstate the complaints as of August 1, 1987 (prior to extradition). This order was entered without notice to Petitioner, who was then in the custody of Allegheny County. Appendix p. A-6-A-7.

It is submitted that the defendant's habeas corpus petition should have been granted. We are mindful that as a general rule the propriety of extradition cannot be challenged in the receiving state but rather only in the asylum state. Commonwealth v. Carlos, 462 Pa. 262, 341 A.2d

Petitioner's Pre-Trial Motion for Relief seeking dismissal pursuant to Pa.R.Crim.P. 1100 raised the question of the violation of his rights to a speedy trial pursuant to the Constitution of the United States of America at Paragraph(5). This matter was raised on appeal to the Superior Court of Pennsylvania. This issue was then raised in Petitioner's Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, Petition.

Petitioner's Petition for Writ of Habeas Corpus was filed on March 3, 1985 and denied March 4, 1985 (without evidentiary hearing). Opinion of

Penkower, J., Court of Common Pleas of Allegheny County, Appendix p. 48-51. The Superior Court of Pennsylvania affirmed the trial Court Opinion, Appendix p. 55-86. Petitioner raised this issue in his Petition for Allowance of Appeal to the Supreme Court of Pennsylvania. The Supreme Court of Pennsylvania denied his Petition on February 6, 1989. Appendix p. 87.

ARGUMENT

Rule 1100 of the Pennsylvania Rules of Civil Procedure, adopted to conform to the decisions of this Court regarding a speedy trial, at all times relevant (emphasis added) to this proceeding, required that defendant be brought to trial within 180 days of the filing of a complaint in lieu thereof that a continuance be sought. Rule 1100(c)(2) and (3) provide the specifics under which a continuance may be granted. On June 8, 1979, upon petition of the Commonwealth, without hearing, without notice to the defendant, and without a record (emphasis added) an order was signed continuing the case generally. Order of Robert E. Dauer, J., Appendix p. 1 A proceeding of this nature, under Rule 1100, is clearly contrary to the

specific wording and intent of the rule, a deprivation of due process, and would require the court's discharge. Commonwealth v. Ray, 240 Pa. Super. 33, 360 A.2d 925 (1976), Commonwealth v. Reynolds, 277 Pa. Super. 145, 419 A.2d 703 (1980). The Pre-Trial hearing could not be used by the Commonwealth to fill in facts not presented at the initial hearing to justify an 1100(c) extension, as that would constitute an impermissible "second bite." Commonwealth v. Akridge, 492 Pa. 902, 422 A.2d 487 (1980). All of the testimony subsequently entered by the Commonwealth at a hearing on the motion to quash was entered solely for the purpose of background, is not evidentiary to a Rule 1100 proceeding, and is superfluous.

Nevertheless, the testimony is constantly referred to by the state and by the lower courts. The Commonwealth is attempting to insert in a motion to quash, testimony which it says it could have supplied at a hearing some five years earlier if in fact a hearing had been held. We have no way of knowing what would have occurred five years earlier.

The only relevant legal issue in this regard is whether or not the Commonwealth brought the defendant to trial within the 180 day rule, and if it did not, did it properly secure a continuance under Rule 1100. The record and the stipulations by the Commonwealth clearly indicate that no hearing on the Rule 1100 petition

was held, no testimony was taken, no record was taken, no order was entered upon a record made, no proper continuance was therefore granted and the defendant was denied a speedy trial within the definitions of Amendment VI of the United States Constitution.

Under these circumstances the only conclusion which can be reached is that the defendant was not granted a speedy trial in accordance with the appropriate Constitutional guarantees and previous decisions of this court.

The Superior Court of Pennsylvania in answering this issue has stated that the defendant expressly waived Rule 1100 and quotes a waiver signed by defendant on October 30, 1984 (Appendix p. 60-63). However, the Court totally ignores that

on each occasion when waivers were signed, a specific reservation of any irregularities regarding 1100 which had occurred prior to November 17, 1983, were reserved. Opinion of Trial Judge Allen Penkower, Appendix page 49-50). In his opinion Judge Penkower stated that "the defendant, by means of a series of waivers pursuant to Rule 1100(d)(2) has effectively waived all objections to delay in the proceeding beginning November 17, 1983" (emphasis added). (Appendix p. 49-50). The transcript and record clearly indicates that the defendant and his counsel and the trial judge went to great lengths to preserve the element of any irregularities in the Rule 1100 issue. It is clear that it was the intention of all parties to reserve the argument of improprieties committed by the state

under Rule 1100 which had occurred prior to November 17, 1983. All continuances subsequent to that date were made solely for the purposes of the convenience of the Commonwealth. The clearness of the record and the intent of the parties cannot be ignored.

The Trial Court justified its ruling denying the Petitioner's Motion to Dismiss pursuant to Rule 1100 on the basis of the time from December 19, 1978 (the filing of the McDonough Complaint) and August 12, 1983 being "excludable" under Rule 1100(d)(1). Opinion of Trial Court, Appendix p. 48-50.

The Court held that a diligent search was made for the Petitioner as required by Rule 1100(d)(1) for the purpose of excluding the time between the filling of the complaint and the Petitioner's apprehension in Colorado on November 27, 1981.

Rule 1100(d)(1) requires a diligent search in order to allow for the automatic exclusion of such time. Commonwealth v. Cohen, 481 Pa. 349, 392 A.2d 1327. (1987). Petitioner urges this Court that the search which was primarily compressed into a two month period immediately following the issuance of the complaint did not meet the standards of due diligence constitutionally required by the Courts of the Commonwealth of Pennsylvania, and thus require his discharge.

As previously indicated, two of the three charges pending against the defendant were dismissed on August 1, 1983. Subsequently, on August 10, 1983, Judge Robert Dauer signed an order directing the extradition of the

defendant, said order stating categorically that the three cases were currently pending against the defendant in the Commonwealth of Pennsylvania. Appendix p. A-3-A-5. In fact, two of the three cases were in a dismissed state but this information was never transmitted to the defendant by mail as required by Rule 1901, nor was the State of Colorado, the Colorado courts, nor his counsel of record advised of

such dismissal. Under these circumstances, believing the order to be accurate, the defendant returned to the Commonwealth of Pennsylvania. Upon his return to the Commonwealth of Pennsylvania, defendant was incarcerated and a cash only bond ordered by the same Judge Dauer on all three cases, although two of the three cases had been dismissed (emphasis added) (The original bond record and testimony at said hearing including testimony of attorney James Irwin to the effect that he was refused, by the Clerk of Courts, the opportunity to enter his appearance on behalf of appellant on March 27, 1979, has not been transcribed, is missing, and part of the record presumed permanently lost by the Commonwealth of Pennsylvania.) At some time

subsequent to this, on or about August 17, 1983, the Commonwealth discovered the irregularities of what it was involved in and proceeded with an ex parte petition to reinstate the complaints. This was accomplished on August 17, 1983, with an order being entered to reinstate the complaints as of August 1, 1987 (prior to extradition). This order was entered without notice to Petitioner, who was then in the custody of Allegheny County. Appendix p. A-6-A-7.

It is submitted that the defendant's habeas corpus petition should have been granted. We are mindful that as a general rule the propriety of extradition cannot be challenged in the receiving state but rather only in the asylum state. Commonwealth v. Carlos, 462 Pa. 262, 341 A.2d

71 (1975). However, inasmuch as the asylum state and Macurdy were unaware of the dismissal, Macurdy had no means or reason for challenging extradition on August 13, 1983. The Commonwealth contends that inasmuch as the order was valid as to one case, it is irrelevant that the other two had been dismissed. However, the defendant maintains that the documentation to support extradition on the one remaining case, is, and remains, defective and that the Commonwealth of Pennsylvania would not have been successful in its attempted extradition on the remaining charge. Having no knowledge of the dismissals, this was not a matter which could be brought before the Colorado courts. The Second Circuit Court has already discussed this issue in United States

v. Toscanino, 500 F.2d 267, reh. den. 504 F.2d 1380 (2d. Cir. 1974). Toscanino held that where suppression of evidence based upon government misconduct was unavailable, and where an accused was kidnapped and forcibly brought within the jurisdiction, the remedy of discharge would be granted. Toscanino, supra. at 275. The Pennsylvania Courts have stated that "only where outrageous conduct is alleged and proved will the court inquire into the circumstances of the arrest to determine whether the person of the defendant should have been excluded from evidence and thereby discharge the defendant." This interpretation is reviewed as developing in the Common-

wealth of Pennsylvania in Commonwealth v. Fiume, 292 Pa. Super. 54, 436 A.2d 1001 (1981) where the Toscanino case is discussed.

The Toscanino case involved an illegal act, to wit, kidnapping. However, in the instant case we are confronted with an even more heinous set of circumstances, kidnapping under color of law. Should the decision in this case remain unreversed so that this case becomes the precedent for future conduct between the states, the results would clearly be an abandonment of legal procedures heretofore considered to be due process.

Appellant submits that the act of extraditing him on two dismissed charges constitutes outrageousness as contemplated in Fiume. Extradition already

having been challenged, the only remaining remedy was discharge.

Appellant maintains that the courts of the Commonwealth of Pennsylvania have deviated so far, abandoned so completely, accepted, well established that equal protection has been interpreted to mean that the law shall be equally applied to all persons in all cases under similar circumstances.

Under the circumstances in this case, the following has occurred:

There is no case law within the history of jurisdprudence of the Commonwealth of Pennsylvania which holds that, under the Rule 1100 maxim, no hearing need be held and that a order continuing a case generally can be entered without a record. There is a mass of cases to the

contrary.

There is no case law holding that a defendant can be extradited on cases which no longer exist. Such an act by the Commonwealth of Pennsylvania constitute outrageous conduct and a denial of due process.

In all of the above instances the Commonwealth has deviated substantially from accepted interpretations of both state and federal questions of law.

In this regard, the defendant has been deprived of equal protection in accordance with the 14th Amendment of the U.S. Constitution and should be discharged.

CONCLUSION

In conclusion, it is respectfully represented to the Court that the refusal of certiorari of the Pennsylvania Supreme Court and the decision of the Superior Court of Pennsylvania regarding the issues raised in this writ are improprer, irregular, contrary to the laws of the Commonwealth of Pennsylvania, contrary to the Constitution of the United States, and contrary to the existing decisions in the same or similar area by this Court; that the appellant was repeatedly denied due process, and that the courts of the Commonwealth of Pennsylvania have deviated beyond reasonable bounds of accepted applications and interpretations of existing law; that

the decisions of the lower courts regarding these issues be reversed and appellant discharged.

Respectfully submitted,

_____

Melvin L. Vatz, Esquire

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	CRIMINAL DIVISION
	:	No. CC7900473:
vs.	:	THEFT BY FAILURE
	:	TO MAKE REQUIRED
	:	DISPOSITON
	:	
THOMAS E. MACURDY, A/K/A TOM E. MACURDY	:	No. 7900828:
	:	THEFT BY FAILURE
	:	TO MAKE REQUIRED
	:	DISPOSITION
	:	
	:	MISARPLICATION OF
	:	ENTRUSTED PROPERTY
	:	
	:	No. 7902540:
	:	DEFAULT IN
	:	REQUIRED
	:	APPEARANCE

ORDER OF COURT

AND NOW, to-wit, this 8th day of June, 1979, the within application submitted by the Commonwealth to Extend the time for Commencement of Trial is hereby granted and the cases shall be tried within 120 days of his returning to Allegheny County for

the purpose of standing trial in this case.

BY THE COURT:

ROBERT E. DAUER, J.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	Nos. 7000473, 7902540, 7900828
vs.	:	CHARGES: Theft by Failure to Make Required Disposition of Funds Received; Misapplication of Entrusted Property; Default in Required Appearance - August, 1983
THOMAS EDWARD MACURDY	:	

ORDER OF COURT

AND NOW, to-wit, this 10th day of August, 1983, it appearing to the court that the above-named defendant is charged at the above numbers with the crimes of: Theft By Failure To Make Required Disposition Of Funds Received; Misapplication of Entrusted Property; Default in Required Appearance, August, 1983. The defendant fled before trial could be held and is a fugitive from

justice of this Commonwealth.

AND IT FURTHER APPEARING that the above-named defendant is now under fugitive arrest in the Boulder County Jail, Boulder, Colorado, and has been ordered extradited to Allegheny County, Pennsylvania.

IT IS HEREBY ORDERED that Eugene Coon, Sheriff of Allegheny County, or his authorized deputies transport the said Thomas Edward Macurdy from the Boulder County Jail, Boulder, Colorado, to the Allegheny County Jail at Pittsburgh, Pennsylvania, to be therein lodged until further order of this court.

This order shall be deemed to be a proper authorization and order upon the Sheriff of Allegheny County to perform the above described services

and upon the Warden of the Allegheny County Jail to assume custody of the above-named subject.

BY THE COURT,

Robert E. Dauer, Judge

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	)	CC7900828
	)	
	)	CHARGE:
VS.	)	Theft by
	)	Failure to
THOMAS E. MACURDY	)	Make Required
	)	Disposition
	)	of Funds
	)	Received/Mis-
	)	application of
	)	Entrusted
	)	Property

ORDER OF COURT

AND NOW, to-wit, this 17th day of August, 1983, after consideration of the within Petition, the Order of Court of August 1, 1983, is hereby vacated and the above-captioned case is hereby Ordered reinstated at the same stage of proceedings as it would have if the Order of August 1, 1983, had not been issued.

BY THE COURT:

_____
Robert E. Dauer, J.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	)	CC7902540
VS.	)	
THOMAS E. MACURDY	)	

ORDER OF COURT

AND NOW, to-wit, this 17th day of August, 1983, after consideration of the within Petition, the Order of Court of August 1, 1983, is hereby vacated and the above-captioned case is hereby Ordered reinstated at the same stage of proceedings as it would have if the Order of August 1, 1983, had not been issued.

BY THE COURT:

Robert E. Dauer, J.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	CRIMINAL DIVISION
	:	No. CC7900473
vs.	:	7900828
	:	7902540
THOMAS E. MACURDY, aka TOM EDWARD MACURDY, aka T.E. MACURDY,	:	
Defendant	:	

ORDER OF COURT

AND NOW, this 13th day of January, 1984, upon consideraton of Defendant's Omnibus Pretrial Motions for Relief, it is hereby ORDERED, ADJUDGED and DECREED, that

1) Motion to Dismiss pursuant to Pennsylvania Rules of Criminal Procedure, Rule 1100(f), is denied.

2) Motion to Quash Information is denied.

3) Motion for Severance is

granted. Separate trials shall be held seriatim with respect to the three informations. Trial shall commence on February 29, 1984, beginning with the earliest filed information.

A copy of said Order shall be served upon the Defendant by Certified and First Class Mail at his address in Boulder, Colorado.

BY THE COURT:

Alan Penkower, J.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	CRIMINAL DIVISION
	:	No. CC7900473
vs.	:	
THOMAS E. MACURDY, aka TOM EDWARD MACURDY, aka T.E. MACURDY,	:	
Defendant	:	

ORDER OF COURT

AND NOW, to-wit, this 4th day of March, 1985, the Defendant's Petition for Habeas Corpus is denied.

BY THE COURT:

Alan Penkower, J.

IN THE COURT OF COMMON PLEAS OF

ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

CRIMINAL DIVISION

VS. CC7900473

THOMAS E. MACURDY, DEFENDANT OPINION

Filed By:

HON. ALAN S. PENKOWER
529 ALLEGHENY COUNTY
COURTHOUSE

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IN THE COURT OF COMMON PLEAS OF

ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA CRIMINAL

DIVISION

VS. CC7900473

THOMAS E. MACURDY,

DEFENDANT

PENKOWER, J. OPINION

The defendant, Thomas E. Macurdy, after a non-jury trial beginning on March 4, 1985, was convicted of two counts of Theft by Failure to Make Required Disposition of Funds Received, 18, Pa.C.S.A. Section 3927(a) and two counts

of Misapplication of Entrusted Property, 18 Pa.C.S.A. Section 4113(a). Defendant was sentenced to two consecutive 11 1/2 to 23 month sentences, to be followed by five years probation, and was ordered to pay restitution in the amount of $100,000. For purposes of sentencing, the Misappropriation of Entrusted Property counts merged with the Theft counts.

Defendant's convictions arose from his handling of funds from the Estate of Ada Mae McDonough, who died on August 12, 1974, survived by her nieces Eleanor Graham (age 69) and Joanne Anderson (age 53). An examination of the record in the light most favorable to the Commonwealth, the verdict winner, reveals the following facts. Defendant, an attorney at law,

was retained by Mrs. Anderson and Miss Graham to represent the estate in late August, 1975. Shortly thereafter, they were named administratrices. From that time until May, 1978, although the two women were the sole heirs of their aunt, neither received any funds from the estate. Mrs. Anderson met repeatedly with defendant to urge him to settle the estate but was unable to get more than vague assurances from defendant, who told her not to worry, that he would "handle things." At no time did either of the women know the total value of the estate, although they did know it included the deceased's residence at 106 Allegheny Avenue, Cheswick, Pennsylvania. In September, 1977, Disciplinary Counsel of the Supreme Court of Pennsylvania filed a formal complaint against defendant and

suggested to Mrs. Anderson and Miss Graham that they hire another attorney. As a result, they retained Attorney Mary Jane Jacques, who contacted defendant in further efforts to settle the estate and also wrote to the District Attorney's Office on September 27, 1978, requesting it to file charges against defendant. Shortly before they testified at a Disciplinary Board hearing on October 12, 1978, each of the heirs received a certified check for $6,000 from the estate. On December 19, 1978, the criminal complaint was filed that resulted in the defendant's conviction.

The lengthy delay in bringing defendant to trial resulted largely from defendant's own actions with respect to the charges. He did not appear at his arraignment on January 22, 1979.

Pursuant to Rule 231, Pa.R.Crim.P., the District Attorney's Office was granted leave to file an information without holding a preliminary hearing because defendant had been located in Colorado. An arrest warrant was issued on March 5, 1979. On November 29, 1981, defendant was arrested in Boulder, Colorado. Defendant contested extradition through the appellate courts of Colorado. Finally, on August 10, 1983, an extradition order was issued by Hon. Robert E. Dauer directing the Sheriff to transport defendant from Colorado to Allegheny County. Defendant was formally arraigned on August 19, 1983. He filed a pro se Omnibus Pretrial Motion for Relief on September 29, 1983, including a Motion to Dismiss pursuant to Pa.R.C.P. Rule 1100(f). A hearing on the Motion to

Dismiss was held on November 9, 1983, and the Motion was denied on January 14, 1984. Defendant, after having counsel appointed to represent him, filed a Supplemental Motion to Suppress Evidence in August, 1984, which was denied after hearing. Defendant's Petition for Writ of Habeas Corpus and to Set Aside Extradition, filed on March 3, 1985, was denied on March 4, and trial began the same day. Defendant was found guilty of the above offenses on March 20, 1985. He filed a Second Supplemental Motion to Suppress (nunc pro tunc) on March 29, 1985, along with his Motion for New Trial and/or Arrest of Judgment.

In his post-verdict motions, defendant first claims that this Court erred in its evidentiary rulings during trial when it admitted records of various financial

The person who testifies for the purpose of qualifying the records need not have any personal knowledge of the facts which are reported in the particular records, Commonwealth v. Kelly, 245 Pa. Super. 351, 369 A.2d 438 (1976), although that person should know the general procedures of the company with regard to its record keeping. Campbell v. Royal Indemnity Co. of N.Y., 256 Pa. Super. 312, 389 A.2d 1139 (1978). The witness qualifying the records should also ordinarily be the custodian of the records, since it is necessary not only to establish the manner in which the records were created, but also to establish that the records have been kept in the regular course of business. Poltorak v. Sandy, 236 Pa. Super. 355, 345 A.2d 201 (1975) (allocatur denied)

institutions. He asserts that the District Attorney had not properly authenticated these records pursuant to 42 Pa.C.S.A. Sections 6108 and 6109. The record clearly shows, however, that the Court took every precaution to see that the strictures of Sections 6108 and 6109 were met.

Pennsylvania has adopted the Uniform Business Records As Evidence Act, 42 Pa.C.S.A. Section 6108, which provides that: a record of an act, condition or event shall,insofar as relevant, be competent evidence if

> the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the time of the act, condition or event, and if, in the opinion of the tribunal, the sources

of information, method and time of preparation were such as to justify its admission.

The person who testifies for the purpose of qualifying the records need not have any personal knowledge of the facts which are reported in the particular records, Commonwealth v. Kelly, 245 Pa. Super. 351, 369 A.2d 438 (1976), although that person should know the general procedures of the company with regard to its record keeping. Campbell v. Royal Indemnity Co. of N.Y., 256 Pa. Super. 312, 389 A.2d 1139 (1978). The witness qualifying the records should also ordinarily be the custodian of the records, since it is necessary not only to establish the manner in which the records were created, but also to establish that the records have been kept in the regular course of business. Poltorak v. Sandy, 236 Pa. Super. 355, 345 A.2d 201 (1975) (allocatur denied)

The Uniform Photographic Copies of Business and Public Records as Evidence Act, adopted in Pennsylvania as 42 Pa.C.S.A. Section 6109, provides in part that if any business institution:

> has kept or recorded any memorandum, writing, entry, print, representation, or combination thereof, of any act, transaction, occurrence or event, and in the regular course of business has caused any or all of the same to be recorded, copied or reproduced by any photographic, photostatic, microfilm, microcard, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the

original may be destroyed, in the regular course of business, unless its preservation is required by law. Any such reproduction in order to comply with this section must accurately reproduce all lines and markings which appear on the original. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding, whether the original is in existence or not.

At trial the Commonwealth presented

evidence of savings deposit slips, cashier's checks, savings withdrawal slips, signature cards and bank statements in all forms: originals, carbon copies, microfilm copies, xerox copies of microfilm copies, and xerox copies of xerox copies of microfilm copies. Several of the banks involved had changed ownership, and business practices had become increasingly sophisticated since the transactions in question. In spite of these difficulties, the record shows that in each instance when an exhibit was accepted as evidence, a custodian or qualified witness testified to the identity and mode of preparation of the document, that it was made in the regular course of business at or near the time of the transaction, and if it was a copy, that the copy accurately reproduced

the original and was made in the regular course of the bank's business. When the requirements of sections 6108 and 6109 were not able to be met, the exhibits were excluded.

Thus, when Ms. Davis, the representative from Equibank, found photocopies of a since-destroyed microfilm in a file, because she was unable to say precisely when the proferred copies were made of the microfilm, they were excluded. Similarly, when Ms. Homich, the records custodian from Pittsburgh National Bank, found photocopies of withdrawal slips and cashiers checks made from the originals in a file regarding the estate, these records were excluded because there was no indication that the copies were made in the regular course of business at or

near the time of the transactions. On the other hand, after extensively examining Ms. Bulger, the banking officer from First Seneca Bank (formerly Keystone Bank), the Court ruled that although she was not the records custodian, because she knew the workings of the bank and how and where the records were kept, she was a qualified witness to testify concerning microfilmed copies of original checks made in the ordinary course of business where the originals had been sent to the customer. Defendant has not stated specifically which records he believes were erroneously admitted into evidence. In view of this and the fact that the record clearly indicates that the court carefully and properly authenticated the records pursuant to Sections 6108 and

6109, it is unnecessary to justify each of the court's rulings on the more than thirty documents offered into evidence during the trial.

Defendant next claims that the Court erred in finding that the District Attorney had proved all of the elements of Theft by Failure to Make Required Disposition of Funds Received, 18 Pa.C.S.A. Section 3927. The crime of Theft by Failure to Make Required Disposition of Funds Received has four elements:

1. The obtaining of property of another;

2. Subject to an agreement or known legal obligation upon the recipient to make specified payments or other disposition thereof;

3. Intentional dealing with the property obtained as the defendant's own; and

4. Failure of the defendant to

make the required disposition of the property.

Commonwealth v. Crafton, 240 Pa. Super. 12, 367 A.2d 1092 (1976) (allocatur denied). At the demurrer stage defendant conceded that the first three elements had been met: he had obtained funds from the estate of Ada Mae McDonough, was subject to a legal obligation to dispose of the funds properly, and he intentionally dealt with the property as his own. He claims, however, that the Commonwealth never proved that there was a demand or legal requirement for such payment. (Trial Transcript, p. 372).

A careful reading of the statute reveals no such demand requirement. Moreover, the record clearly indicates that Mrs. Anderson and Ms. Graham trusted

defendant and expected him to settle the estate and remit any proceeds to them. His obligation to them did not hinge on their asking specifically for payment, particularly when it was clear to all of the parties that neither of the women had any idea of the amount of money and property involved. Defendant's attempts to read into the statute a requirement that the Commonwealth prove that the victims of embezzlement had demanded proper disposition of the funds ignores the nature of the "known legal obligation", the second element of the offense. The legal obligation is to properly dispose of the funds without demand; the statute prohibits an abuse of the trust one person places in another to dispose of the funds properly. Thus, the Commonwealth having proved all the

elements of Theft by Failure to Make Required Disposition, there was no error in the Court's ruling.

In his third claim, defendant asserts that the court erred in denying his motion to dismiss based on the applicable statute of limitations. The two-year limitations period had run on the instant charges prior to the complaint being filed, but the District Attorney had averred in the information that either fraud or a breach of fiduciary obligation was a material element of the offenses. This satisfied the notice requirement of 42 Pa.C.S.A. Section 5552(c) (1), and allowed prosecution to be commenced within one year after the discovery of the offense. Commonwealth v. Eackles, 286 Pa. Super. 146, 428 A.2d 614 (1981).

The complaint filed by Disciplinary Counsel against defendant in September, 1977, charged him with receiving $7,283.71 of estate funds and depositing it in his own account, and depositing $13,029.07, the net proceeds from the sale of decedent's residence, into his own account without accounting to the administratrices as to its disposition. One month later, but still more than a year before the complaint in the instant case was filed' by the District Attorney, Disciplinary Counsel had confirmed that personal expenses had been paid from the account and that the balance of the account had fallen below the amounts of deposits. Defendant claims that these circumstances constituted "discovery of the offense" under the terms of the statute, and so the district attorney's

filing of the complaint was not timely. Therefore, he argues, the counts concerning these funds should be dismissed.

Defendant erroneously equates knowledge on the part of Disciplinary Counsel with the same knowledge on the part of the District Attorney's Office; doing so, he misinterprets the relationship between the two entities. Rule 402(a) of the Pennsylvania Rules of Disciplinary Enforcement provides that all proceedings are confidential until an order is entered for public discipline, with the proviso in subsection 402(b) (2) that the rule shall not be construed to require Disciplinary Counsel to refrain from reporting the commission or suspected commission of any criminal offense or information relating to a

criminal offense.

Pa.R.D.E.402(b) (2) (emphasis added). In other words, there is no requirement that Disciplinary Counsel report Z information to the District Attorney's office; it can keep the proceedings completely confidential until an order is issued. To assert that the statute of limitations period for a criminal complaint filed by the District Attorney's Office can be triggered by a confidential investigation conducted by a completely separate and independent body ignores the policy considerations behind the statute of the limitations. In the instant case there is no evidence that the District Attorney was dilatory in filing its complaint once it had enough information about defendant's actions.

Assuming, however, that Disciplinary

Counsel informed the District Attorney's Office in October, 1977 that it had information that personal expenses had been paid from the estate account, and that the balances of the account had fallen below the amounts of the deposits, defendant's claim would still be meritless. The Court in Commonwealth v. Hawkins, 294 Pa. Super. 57, 439 A.2d 748 (1982), expanded on the term "discovery of the offense" as set forth in the limitations statute. After giving the definition of the term from Black's Law Dictionary, the court noted that other states have distinguished between mere suspicion and actual discovery of wrongdoing:

> Discovery of the offense has also been defined as 'gaining knowledge of or finding out that a penal statute has been violated.' The Supreme Court of Kansas has stated that (in a

> civil case) discovery of the fraud [i]mplies knowledge, and is not statisfied by mere suspicion of wrong. The suspicion may be such as to call for further investigation, but is not itself a discovery. Migenback v. Migenback, 176 Kan. 471, 478, 271 P.2d 782, 787 (1954), quoting Marbourg v. McCormick, 23 Kan. 38, 43 (1879). See also State v. Civella, 368 S.W.2d 444, 451 (Mo. 1963)

Commonwealth v. Hawkins, 439 A.2d at 750.

Applying these principles to the case before it, which involved a fraud in a job training program, the Hawkins court found that the Commonwealth had only suspicions of criminal activity two years before filing the information. Discrepancies had indeed been found more than a year before the information was

filed, as well as error constituting a violation of the federal guidelines for that particular statute referred to in Hawkins is 18 Pa.C.S.A. Section 108(c)(1), which was repeated from Title 18 and transferred verbatum to 40 Pa.C.S.A. Section 5552(c) (1) by Act of 1976, July 9, P.L. 586, No. 142, eff. June 27, 1978. program, but the discovery of the offenses had not occurred until later, when the District Attorney's Office was informed by appellant that she had received the proceeds of two checks issued to a fictitious name two years earlier.

Similarly, in the instant case the facts known to Disciplinary Counsel in October, 1977, did not rise above the level of suspicions. Although Disciplinary Counsel knew that withdrawals had been made, he did not know for certain whether the administratrices had been paid. Even

under the "net shortage" method of accounting, which allows the Commonwealth to show the gross amount by which the defendant was short of the full payment required to be disbursed, Commonwealth v. Stoner, 264 Pa. Super. 136, 399 A.2d 703 (1979), the fact of non-disbursement must be established. Only when Mrs. Anderson and Miss Graham testified in March, 1978, at which time all bank records had been received and the Board learned that the defendant had not made the required dispositions, did "discovery of the offense" occur. This was within one year of filing the complaint.

Defendant points to Mrs. Anderson's knowledge in October, 1977, that he had not paid the inheritance taxes, and her statement to him that "I don't intend to go to jail" as proving that Mrs. Anderson

had constructive knowledge of the offenses. In doing so, however, he ignores the nature of their relationship and the extent of her knowledge. Defendant had repeatedly told the administratrices that he would "take care of things", (Suppression Hearing Transcript, pp. 36-38), and he explained to Mrs. Anderson that he never paid the inheritance taxes until they absolutely had to be paid. (Id., p.64) Even after the Disciplinary Board hearing Mrs. Anderson trusted defendant, visiting his office in an attempt to obtain a final audit. She testified at the Suppression Hearing, "I still went in good faith, and I can honestly say that." (Id., p. 66). In Mingenback v. Mingenback, 176 Kan. 471, 271 P.2d 781 (1954), cited in Hawkins, that court followed the rule

that:

> ...if the evidence shows the conduct of the defendant was such as to throw plaintiffs off their guard, or to lull them into a sense of security so as to lead them to omit or forego the examination of the records, then the statute begins to run from the date of the actual knowledge of the fraud.

Mingenback, 271 P.2d at 787.

Although Mingenback was a civil case, the same principle applies in the instant case, where defendant repeatedly assured Mrs. Anderson that the inheritance taxes would be paid when it was time. Moreover, even if Mrs. Anderson knew that defendant had not paid the taxes, this alone would not be sufficient to support a belief that defendant had misappropriated or embezzled funds from the estate. As administratrix of the

estate, the letters from the Pennsylvania Department of Revenue were addressed to her personally; understandably, she was concerned about her legal liability when, as attorney for the estate, defendant was the only person with the information and funds to pay the taxes. In sum, there is no merit to defendant's statute of limitations argument.

Defendant also claims that the Court erred in its rulings on his motions to suppress. Defendant's Supplemental Motion to Suppress Evidence, filed on August 9, 1984, concerned whether the Disciplinary Board properly turned his bank records over to the District Attorney's Office without a court order and whether his privacy rights were violated when the bank showed these records to the District Attorney's Office

before charges were filed against defendant. Another suppression motion was filed concurrently with defendant's Motion for New Trial and/or Arrest of Judgment on March 29, 1985. In this motion, defendant claimed that the bank records should be suppressed because the Commonwealth never proved that Disciplinary Counsel had served proper notice on defendant that his bank records were being subpoenaed. Because the suppression issues are closely related they will be addressed together.

The evidence at the Suppression Hearing indicates the following. As a result of a separate investigation of defendant in 1975 and 1976, Disciplinary Counsel issued subpoenas to obtain copies of defendant's account at Keystone Bank. John Quinn, Disciplinary Counsel

at the time in question, testified that these records were obtained in the normal course of Disciplinary Counsel's actions. Thus, although he had no independent recollection of doing so, he said he presumed that the procedures outlined in Rule 213(b), Pa.R.D.E., had been followed, including sending a copy of the statement calling for the issuance of the subpoena to the respondent attorney by certified mail.

This conclusion was not challenged by defendant, nor did he introduce any evidence that the procedures were not adhered to. This specific issue was not raised before or during trial, so cannot be raised on appeal, Pa. R.A.P. Rule 302, but it is worth noting that defendant has offered no basis whatsoever for his claim that the issuance of these subpoenas was

improper, nor has he indicated that his objections were raised before a hearing committee pursuant to Pa.R.D.E. Rule 213(d).

In part as a result of the information received, Disciplinary Counsel sent defendant a letter of allegation in September, 1977, charging him with improprieties in his handling of the estate funds. See this opinion, -a at p. 9. After further investigation, including a hearing in March, 1978, the Supreme Court issued an emergency suspension order on June 22, 1978. In October of that same year Disciplinary Counsel turned the bank records over to the District Attorney's Office. Using these records, Detective Skirtich from the District Attorney's Office met with the bank officer from Keystone Bank, who

provided him with photocopies of the same records so that Skirtich could clarify and match items. The bank provided for comparison only records which were copies of those which had been obtained from Disciplinary Counsel. For trial purposes, subpoenas were issued to the bank for the production of these records.

Defendant cites Commonwealth v. DeJohn, 486 Pa. 32, 403 A.2d 1283 (1979), cert. denied, DeJohn v. Pennsylvania, 444 U.S. 1032, 100 S.Ct. 704, 62 L.Ed.2d 668 (1980), in arguing that his right to privacy in his bank records required the District Attorney to obtain them through a search warrant. In DeJohn, the Pennsylvania Supreme Court accepted the analysis of the California Supreme Court in Burrows v. Superior Court of San

Bernardino County, 13 Cal.3d 238, 118 Cal.Rptr. 166, 529 P.2d 590 (1974), and held that under Art.I, Section 8 of the Pennsylvania Constitution, bank customers have a legitimate expectation of privacy in records pertaining to their affairs kept at the bank. Commonwealth v. DeJohn, supra, 403 A.2d at 1290.

The instant case is readily distinguishable from DeJohn, however, which involved illegal subpoenas by which police officers obtained bank records directly from Mellon Bank. In the instant case, the subpoenas by which Disciplinary Counsel obtained the records were perfectly legal and had been issued pursuant to an investigation under Pa.R.D.E. Rule 213. Under this rule, the privacy rights of the respondent-attorney are protected by the confidentiality

provision of Rule 213(h) and Rule 402. Only after the emergency suspension order was issued were the bank records turned over to the District Attorney's Office. This order was a public discipline under Rule 204. Because of this, pursuant to Rule 402(a) (1), the proceedings of the Disciplinary Board were no longer confidential. The entire record, including the exhibits, had been submitted to the Chief Justice under Rule 208(d) (2) (ii) See Pa.R.A.P., Rule 1921 (exhibits are part of the record), and Rule 3191 (records of the Supreme Court are public). In sum, once there was a public discipline imposed by the Supreme Court, defendant no longer had an expectation of privacy in those particular bank records. There was thus

no impropriety in the Disciplinary Board's actions turning the records over to the District Attorney.

Defendant asserts that when Skirtich viewed the records at Keystone Bank he was able to obtain information illegally which formed the basis for the complaint which was ultimately filed against him. However, Detective Skirtich viewed only those records of which he already had copies from the Disciplinary Board. There was no subterfuge used in viewing the records, no illegal subpoenas as in DeJohn. For suppression to be a proper remedy for an allegedly improper search or seizure there must be some official misconduct. Commonwealth v. Eshelman, 477 Pa. 93, 383 A.2d 838 (1978). Because there was no misconduct by the District Attorney's Office, there was no basis to

suppress the records. Therefore the court's denial of defendant's Supplemental Motion to Suppress was proper.

Defendant next contends that the Court erred in denying his Petition for Writ of Habeas Corpus and to Set Aside Extradition. His claim is based on the following logic. The extradition order issued by Hon. Robert E. Dauer on August 10, 1983, applied to three cases: (1) CC 7900743, the case sub judice; (2) CC 7900828, involving similar charges concerning a second estate; and (3) CC 7902540, charging Default in Required Appearance by reason of defendant failing to appear for formal arraignment at CC 7900743. Prior to the issuance of the extradition order, Judge Dauer, on August 1, 1983, dismissed the

informations at CC 7900828 and CC 7902540, pursuant to Rule 1901 of the Pennsylvania Rules of Judicial Administration, because of inactivity. Upon petition of the District Attorney, Judge Dauer, on August 17, 1983, vacated his previous orders for good cause shown, thereby reactivating the two cases. Defendant had been transported, pursuant to the extradition order, from Colorado to the Allegheny County Jail, at a time when the dismissal orders were in effect with respect to the two cases. Therefore, defendant argues, the extradition order (which applied to all three cases) was invalid.

Defendant's claim is devoid of merit for several reasons. First, the Orders of Court, issued August 17, 1983, vacating the Order of Court of August 1, 1983,

specifically ordered that the cases were reinstated at the same stage of the proceedings as if the Order of August 1, 1983 had not been issued. Therefore, the extradition order, insofar as it related to these two cases, was valid. Second, assuming arguendo that the extradition order was improper with respect to the two cases because those cases had been dismissed of record at that time, the extradition order would still be effective with respect to the third case, the one at the bar. Defendant argues that the extradition order was invalid even with respect to the instant case, because it is impossible to know whether the Colorado Supreme Court would have denied his final appeal in the extradition proceedings had it known that two of the three cases that were subject

to the extradition proceedings had been dismissed. This argument is specious. Finally, the legality of the extradition must be challenged in the asylum state prior to extradition to the demanding state. Commonwealth v. Caffrey, 352 Pa. Super. 406, 508 A.2d 322 (1986); Commonwealth v. Carlos, 462 Pa. 262, 341 A. 2d 71 (1975)

Defendant next claims that the Court erred in denying his Motion to Dismiss for violation of Pa.R.Crim.P., Rule 1100. This contention has been addressed in detail in a separate opinion dealing with all three cases that were the subject of the extradition proceeding. In summary, upon review of the transcript of the hearing on this motion and the documents filed in this case, it is clear that the Motion to Dismiss was properly denied.

Based on the totality of circumstances, it is evident that a diligent search was conducted for the defendant. Moreover, in calculating exclusions to determine the period of commencement of trial, the "diligent search" requirement is applicable Z under Rule 1100(d) (1), the provision dealing with the exclusion of the period of time between the filing of the written complaint and the defendant's arrest. Rule 100(d) (3) (i) provides for the exclusion of periods of delay resulting from the unavailability of the defendant. Subsections (d) (i) and (d) (3) (i) are mutually exclusive of each other for purposes of computing the Final Trial Date. The Commonwealth is entitled to rely on either or both in seeking to establish compliance with Rule 1100.

The defendant, by means of a series

of waivers pursuant to Rule 1100 Id) (2) , has effectively waived all objections to delay in the proceedings beginning November 17, 1983. The criminal complaint was filed on December 19, 1978. The record is sufficient to establish that prior to that date defendant had relocated to Colorado, that reasonable efforts to locate him had not born fruit until his arrest in Colorado in 1981, that he contested extradition thereafter and was unavailable for trial until brought back to the jurisdiction of Allegheny County on August 13, 1983. Pursuant to Rule 1100(d) (3), there is therefore an adequate basis to exclude all periods of time between December 19, 1978, and August 12, 1983, and to conclude that the Rule 1100 180-day "run date" would not expire until February.

1984, well into defendant's waiver period.

Finally, defendant claims, without elaboration, that the verdict was against the weight of the evidence and that the evidence presented was insufficient to sustain the verdict.
Because he fails to state with specificity in what respect the evidence supports his claims, he has preserved no issues for review. Commonwealth v. Holmes, 315 Pa. Super. 256, 461 A.2d 1268 (1983); Commonwealth v. Martin, 346 Pa. Super. 129, 499 A.2d 344 (1985). See also Pa.R.Crim.P. 1123(a) and (c) (3).

For the above reasons of fact and law, defendant's Motion for New Trial and/or Arrest of Judgment was properly denied.

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
v.	:	PENNSYLVANIA
THOMAS E. MACURDY, a/k/a TOM EDWARD MACURDY a/k/a T.E. MACURDY,	:	NO. 00193 PGH 84
Appellant	:	

Appeal from the Order entered January 13, 1984 in the Court of Common Pleas of Allegheny County, Criminal Division, at Nos. 7900473, 7900828, 7902540

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
v.	:	PENNSYLVANIA
THOMAS EDWARD MACURDY,	:	
Appellant	:	NO. 00296 PGH 85

Appeal from the Order entered March 4, 1985 in the Court of Common Pleas of Allegheny County, Criminal Division, at No. CC 7900473.

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
v.	:	PENNSYLVANIA
THOMAS EDWARD MACURDY,	:	
Appellant	:	NO. 00680 PGH 86

Appeal from the Judgment of Sentence of April 9, 1986 in the Court of Common Pleas of Allegheny Criminal Division, at No. 7900473.

BEFORE: TAMILIA, POPOVICH, AND HOFFMAN, JJ.

MEMORANDUM: FILED: JULY 7, 1988

This is a consolidated appeal from the orders of the trial court and from the judgment of sentence for two counts of theft by failure to make required disposition of funds and two counts of misapplication of entrusted property. Appellant contends that the evidence was insufficient to support the conviction for theft by failure to make required disposition of funds; and that the trial court erred in (1) denying his petition for writ of habeas corpus and dismissal; (2) determining that the Commonwealth used due diligence in apprehending appellant, as required under Pa.R.Crim.p. 1100(d) (1); (3) denying his motion to suppress evidence

obtained in violation of the Pennsylvania Rules of Disciplinary Enforcement; (4) denying his motion to suppress evidence viewed by the District Attorney without a search warrant; (5) denying his motion to quash the reinstatement of informations; and (6) ordering the reconstruction of the record. For the reasons that follow, we quash the appeal in part and affirm the judgment of sentence.

On December 19, 1978, a criminal complaint was filed against appellant charging him with theft by failure to make required disposition of funds received, 18 Pa.C.S.A. § 3927(a), and misapplication of entrusted property, id. § 4113(a), in connection with the mishandling of the assets of

the estate of Ada Mae McDonough.[1] Appellant failed to appear at his arraignment on these charges, which resulted in the filing of a complaint charging him with default in required appearance, 18 Pa.C.S.A.§ 5124.[2] On January 31, 1979, another complaint was filed against appellant, alleging the mishandling of the assets of the estate of Palmira Moretti.[3] Appellant was arrested on November 29, 1981, after he was located by authorities in Boulder, Colorado. On August 1, 1983 the trial court dismissed the complaints at CC 7900828 and CC 7902540, pursuant to Pa.R.J.A. 1901(a). Appellant was extradited from Colorado on August 13, 1983. The court vacated its dismissal order on August 17, 1983 and reinstated the complaints at CC 7900828 and CC

7902540. Appellant filed an omnibus pretrial motion on September 29, 1983, alleging that the Commonwealth violated Rule 1100 as to all three complaints and that the reinstatement of the two complaints on August 17, 1983 was improper. The trial court denied these motions, and appellant appealed from that order.

Appellant filed a petition for a writ of habeas corpus and to set aside extradition on March 3, 1985. The court denied this petition and appellant filed a notice of appeal from that order. Following a non-jury trial on CC 7900473 (relating to the McDonough estate) from March 5-20, 1985, appellant was found guilty of the theft by failure to make required disposition of funds and misapplication of entrusted

property. Appellant was sentenced to two consecutive terms of eleven-and-one-half-to-twenty-three months imprisonment, to be followed by five years probation. An appeal from[4] the judgment of sentence followed.

Appellant first contends that the evidence was insufficient to support the convictions for theft by failure to make required disposition of funds received because a legal obligation to disburse the funds did not arise.[5] It is settled law that the test for evaluating the sufficiency of the evidence in a criminal case is whether, viewing the evidence in the light most favorable to the Commonwealth as the verdict winner and drawing all reasonable inferences

therefrom upon which the factfinder could properly have based its verdict, there is sufficient evidence to enable the trier of fact to find beyond a reasonable doubt every element of the crime of which appellant has been convicted. Commonwealth v. Davis, 491 Pa. 363, 369, 421 A.2d 179, 182 (1980). After careful review of the record and the briefs submitted by the parties, we conclude that the trial court has adequately disposed of this contention. We add only that the fact that appellant failed to make any payments to the heirs of the estate for nearly four years, and the fact that the administratrices made repeated demands for payment, see N.T. March 4-20, 1985 at 58, 60, 64, support the

conclusion that appellant did fail to make the required disposition of the assets. Accordingly, we affirm this issue on the basis of the trial court's opinion. See Trial Court Opinion at 7-8.

Appellant next contends that the trial court erred in denying his petition for a writ of habeas corpus and to set aside extradition. Upon an examination of the record and the parties' briefs, we conclude that the trial court has correctly addressed this contention and, therefore, we affirm this issue for the reasons set forth in the trial court's opinion. See Trial Court Opinion at 17-19.

Appellant next contends that the trial court erred in

determining that the Commonwealth exercised due diligence in aPprehending him. Appellant argues that the Commonwealth violated his Rule 1100 rights by failing to use reasonable efforts to locate him in Colorado. Rule 1100 provides that

> Trial in a court case in which a written complaint is filed against the defendant after June 30, 1974 shall commence no later that one hundred eighty (180) days from the date on

which the complaint is filed.

Pa.R.Crim.p 1100(a) (2). The Rule further provides

> In determining the period for commencement of trial, there shall be excluded therefrom:
>
> (2) any period of time for which the defendant expressly waives Rule 1100.

Pa.R.Crim.p. 1100(d)(2).

Here, appellant waived his rights under Rule 1100 on October 30, 1984. The waiver form, which was signed by both appellant and his counsel, provides in pertinent part:

> 1. That I am aware that I am charged with theft by required

disposition at CC 7900473.

2. That I am aware that the complaint in the above-captioned case was filed on February 6, 1979.

4. That I am aware that a 180 day period with extensions from the filing date of Feb. 6, 1979 will expire on Dec. 28, 1984.

* * *

WHEREFORE; having read and understood the above facts, I desire to and hereby do waive my rights to a speedy trial under Rule 1100 Pennsylvania Rules of Criminal Procedure, and agree to be tried no later than March 29, 1985.

Defendant's Waiver of his Right to a Speedy Trial Pursuant to Rule 1100 Pennsylvania Rules of Criminal Procedure at 1-3. Appellant does not challenge the validity of this express waiver on appeal. Thus, we conclude that appellant expressly waived any Rule 1100 violation that may have occurred from the date of the filing of the complaint until March 29, 1985. Appellant's trial commenced on March

under the Rules of Disciplinary Enforcement. He maintains, therefore, that the records should have been suppressed because the District Attorney's Office obtained them from the Disciplinary Board without a search warrant. We disagree.

The Rules of Disciplinary Enforcement provide that all proceedings involving attorney misconduct or disability shall remain confidential unless or until the Supreme Court enters an order for the imposition of public discipline. Pa. R. Disciplinary Enforcement 402(a) (1) [hereinafter Pa.R. D.E.] The Rule further provides, however, that this confidentiality provision shall not

under the Rules of Disciplinary Enforcement. He maintains, therefore, that the records should have been suppressed because the District Attorney's Office obtained them from the Disciplinary Board without a search warrant. We disagree.

The Rules of Disciplinary Enforcement provide that all proceedings involving attorney misconduct or disability shall remain confidential unless or until the Supreme Court enters an order for the imposition of public discipline. Pa. R. Disciplinary Enforcement 402(a) (1) [hereinafter Pa.R. D.E.] The Rule further provides, however, that this confidentiality provision shall not

be construed to

> Require Disciplinary Counsel to refrain from reporting to law enforcement authorities the commission or suspected commission of any criminal offense or information relating to a criminal offense.

Id. at 402(b) (2).

Here, we note at the outset that appellant does not allege that the Disciplinary Board improperly obtained his bank records. Appellant instead argues that, once in the Board's possession, the bank records had to remain confidential until the imposition of public discipline. Although the Supreme Court had ordered an emergency suspension, appellant argues that the appeal

process was not complete and the order disciplining him did not become final until after the District Attorney had obtained his bank records. Brief for Appellant at 26. Even assuming appellant's argument to be correct, we conclude that he is not entitled to relief because the district attorney's office inevitably would have properly obtained the records.

If evidence ultimately or inevitably would have been discovered by lawful means, free of any constitutional violation, then the evidence should not be excluded. Nix v. Williams, 467 U.S. 431, 444 (1984). See also Commonwealth v. Speaks, 351 Pa. Super. 149, 155-56, 505 A.2d 310, 314 (1986).

> [W]here the prosecution can establish that the challenged evidence would have come to its attention from an independent source free of taint, there is not the type of exploitation of the illegality that requires the imposition of the rule of exclusion.

Commonwealth v. Devan, 338 Pa. Super. 95, 105-06, 487 A.2d 869, 874 (1985) (plurality opinion) (quoting Commonwealth v. Brown, 470 Pa. 274, 284, 368 A.2d 625, 631 (1976)).

Here, the prosecutor received the bank records from the Disciplinary Board in October 1978. Appellant was disbarred in March 1979. Thus, five months after the prosecutor "improperly" obtained the records, they would have been made a matter of public record, to which anyone would have had access.

See Pa.R. D.E. 402 (a) (1).

Moreover, because Disciplinary Counsel have an obligation to report the commission or suspected commission of criminal activity to law enforcement authorities, Pa.R. D.E. 402(b) (2) , it is reasonable to assume that Disciplinary Counsel would have made this information directly available to the prosecutor no later than March 1979. Accordingly, because the prosecutor could have legally obtained the bank records in March 1979, we conclude that the trial court did not err in denying appellant's motion to suppress this evidence.

Appellant next contends that the trial court erred in denying his motion to suppress his

bank records because they were viewed without a search warrant by members of the District Attorney's Office. Specifically, appellant argues that the comparison of the bank records obtained from the Disciplinary Board with the original records in the bank's files constituted an illegal search.

At the suppression hearing, an investigator from the district attorney's office testified that he had compared the bank records in the prosecutor's possession with microfilm records at the bank because the microfilm was clearer. N.T. October 29-30, 1984 at 112-13. The investigator further testified that he looked only at the bank's microfilm versions of records

that the prosecutor already had and that he did not obtain any additional information from the bank. Id. at 121-22. Because we have determined that the prosecutor's possession of the records from the Disciplinary Board was legal, we conclude that no separate and discrete "seizure" of information occurred when the investigator compared its duly seized records with the records at the bank. In addition, because no additional information was sought or obtained through the viewing of the bank's own records, appellant can articulate no suppression remedy even if the comparison was an "illegal" search and seizure. Accordingly, appellant is not

entitled to relief on this issue.

Appellant next contends that the trial court erred in denying his motion to quash the reinstatement of the informations at CC 7900828 (relating to the Moretti estate) and CC 7902540 (relating to default in required appearance). Appellant argues that the reinstatement of these informations was improper because he was not given notice of the court's action. We conclude that the appeal as to this issue is interlocutory and, therefore, not properly before us for review.

These informations were dismissed by the trial court on August I, 1983 pursuant to Pa.R.J.A. 1901(a). The court

reinstated the informations on August 17, 1983. Appellant filed a motion to quash the reinstatement of the complaints because they were reinstated after the expiration of the statute of limitations. The court denied his motion to quash and appellant appealed that order. The Commonwealth filed a motion to quash the appeal. This Court denied the Commonwealth's motion, entering the following order in response to the Commonwealth's petition for reconsideration:

> AND NOW, to-wit, this 6th day of June, 1984, upon consideration of the Petition for Reconsideration and/or Clarification, the Motion for reconsideration is hereby denied. The original motion to quash was denied inasmuch as an

appeal based on double jeopardy grounds is appealable. Commonwealth v. Bolden, 472 Pa. 602, 373 A.2d 90 (1977). Because the issue of whether a dismissal under Rule of Judicial Administration 1901 is a dismissal with prejudice, and therefore would bar re-prosecution, appears to be an issue of first impression, a motion to quash is an inappropriate vehicle for disposition of this appeal. The

merits of such an argument should be decided by a panel of this court after full argument.

We therefore denied the motion because, at first blush, it appeared that a double jeopardy issue was raised. Appellant, on appeal, however, is no longer arguing that the reinstatement of the informations is improper on double jeopardy grounds. Rather, he

argues only that the reinstatement was improper because he was not given notice as required by Pa.R.Crim.p 9023(a). His appeal as to this issue, therefore, is not one that is interlocutory as of right. See Pa.R.A.p. 311. Accordingly, we must quash the appeal as to this contention.

Appellant last contends that the trial court erred in ordering that the record be reconstructed. Appellant concedes that most of the original record in this case was lost; however, he argues that it was improper for the trial court to order that photostatic copies of the documents be included in the record because Rule 1926 of the Rules of Appellate

Procedure provides that BAll other questions as to the form and content of the record shall be presented to the appellate court." Pa.R.A.P. 1926. Brief for Appellant at 34. Rule 1926, however, also provides that

> If anything material to either party is omitted from the

record by error or accident or is misstated therein, the parties by stipulation, or the lower court either before or after the record is transmitted to the appellate court, or the appellate court, on proper suggestion or of its own initiative, may direct that the omission or

misstatement be corrected, and if a necessary that a supplemental record be certified and transmitted. Id. (emphasis supplied). Appellant fails to allege any inaccuracies in the record as it presently exists. In addition, he fails to state how he was prejudiced by the reconstruction of the record.[7] Although the reconstruction necessarily was extensive in this case, we conclude that the trial court did not err in ordering that photostatic copies of the original documents be included in the record.

For the foregoing reasons, we quash the appeal in part and affirm the judgment of sentence.

Appeal quashed in part. Judgment of sentence affirmed.

FOOTNOTES

[1] This complaint was filed at CC 7900473.

[2] This complaint was filed at CC 7902540.

[3] This complaint was filed at CC 7900828.

[4] The three appeals were consolidated for our review.

[5] Appellant also contends that the evidence was insufficient to support the conviction for misapplication of entrusted property. Appellant specifically

challenged the sufficiency of the evidence only with respect to the convictions for theft. In addition to challenging the sufficiency of the evidence to support the theft conviction in his Post-verdict motions, appellant alleged that "The evidence presented was insufficient to sustain the verdict of the Court." Motion for New Trial and/or Arrest of Judgment at 3. We conclude, therefore, that appellant has not preserved for our review the sufficiency contention as to the conviction for misapplication of entrusted property. See Commonwealth v. Holmes, 315 Pa. Super. 256, 266,

461 A.2d 1268, 1273 (1983) (boiler-plate allegations that evidence is insufficient to support verdict or that verdict is against weight of evidence will not preserve issues for appellate review).

[6] Appellant also argues that his Rule 1100 rights were violated with regard to CC 7902540, charging him with default in required appearance. This action has not yet been brought to trial, however. The court's order denying appellant's

pretrial motion to dismiss for violation of Rule 1100 with respect to this action is interlocutory and, therefore, not appealable as of right. See Pa.R.A.p. 311. See also Commonwealth v. Lee, 246 Pa. Super. 294, 296, 369 A.2d 1329, 1330 (1977) (pretrial challenge of Rule 1100 violation not appropriate for resolution on interlocutory appeal.)

[7] Indeed, had the record been transmitted to this Court without the inclusion of the missing documents, we would have been unable to dispose of appellant's appeal. In that event, we most likely would have remanded the record to the trial court so that copies of the missing documents could be included.

February 8, 1989

Melvin L. Vatz, Esquire
Grossinger, Gordon & Vatz
1000 Law & Finance Building
Pittsburgh, Pennsylvania 15219

In Re: Commonwealth of Pennsylvania v. Thomas E. Macurdy, a/k/a Thomas Macurdy, a/k/a Tom Edward Macurdy, a/k/a T.E. Macurdy, Petitioner
(Court of Common Pleas Nos. CC7900473, 7900828 & 7902540)
(Superior Court Nos. 193 Pittsburgh, 1984; 296 Pittsburgh, 1985 and 680 Pittsburgh, 1986)
No. 427 W.D. Allocatur Docket, 1988

Dear Mr. Vatz:

The Court has entered the following Order on your Petition for Allowance of Appeal in the above-captioned matter:

"Denied
2/6/89
Per Curiam:

Very truly yours,

Irma T. Gardner
Deputy Prothonotary
Supreme Court of
Pennsylvania

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of April, 1989, I served a true and correct copy of the attached Petition by first-class, U.S. Mail, postage prepaid on:

Robert L. Eberhardt
Deputy District
Attorney
401 Courthouse
Pittsburgh, PA 15219

Melvin L. Vatz, Esquire